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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 332

WILLIAM BENZ, M. D. MacRAE, JEFF MORRISON, ET AL.,

Petitioners,

vs.

COMPANIA NAVIERA HIDALGO, S. A., A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

KNELAND C. TANNER,
RICHARD R. CARNEY,
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SUPREME COURT OF THE UNITED STATES

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vs.

COMPANIA NAVIERA HIDALGO, S. A., A CORPORATION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William Benz and others, the petitioners above-named, for a writ of certiorari to review a decree of the United States Court of Appeals for the Ninth Circuit, entered on June 30, 1953, dismissing the petitioners' appeals from temporary injunctions issued by the District Court of the United States for the District of Oregon, respectfully shows:

Summary Statement of Matter Involved

The petitioners are individuals and unions representing groups of merchant seamen. The respondent is a Panamanian Corporation which owns and operates the

S. S. Riviera, a vessel registered under the flag of Liberia. The petitioners picketed the vessel at the Port of Portland, Oregon until the United States District Court for the District of Oregon issued temporary injunctions restraining the picketing in separate suits brought by the respondent.

Pursuant to Title 46 U. S. C. A. Sec. 110, the petitioners took appeals from the interlocutory injunctions to the United States Court of Appeals for the Ninth Circuit. While the appeals were pending the respondent filed a motion to dismiss the appeals on the ground that they had become moot. The principal ground for the motion was that the vessel had departed from the Port of Portland after the picketing had ceased, pursuant to the injunctions, and that the vessel had no charter or engagement to return to the United States. The Court of Appeals was of the opinion that the temporary injunctions and the appeals therefrom had become moot due to the departure of the vessel and that therefore the court should not decide and settle a controversy involving the future rights of the parties in the event the vessel should return. The Court of Appeals was also of the opinion that the dismissal of the injunction suits would not affect the pending suits by the respondent for damages. The court believed that the respondent's right for damages was not dependent upon the maintenance by the court below of its equity jurisdiction.

In answer to the contention that the appeals from the temporary injunctions were not moot because of the remaining question of the petitioners' rights to damages for the wrongful procurement of the injunctions, the Court of Appeals held that, since no bond or undertaking was required or furnished pursuant to Section 107, Title 29 U. S. C. A. or Rule 65(a) of the Rules of Civil Procedure, there could be no recovery of damages by the petitioners for the wrongful issuance of the injunctions.

The decision effectively deprived the petitioners of the

right granted them by Section 110, Title 29 U. S. C. A. for speedy appeal and determination of the propriety of the issuance of temporary injunctions in cases involving labor disputes. This ruling also nullified petitioners' right for loss, expense, damages, costs and attorneys' fees accorded them by Section 107, Title 29 U. S. C. A.

Jurisdictional Statement

(a) The jurisdiction of this Court is founded upon Section 1254(1), Title 28 U. S. C. A.; 62 Stat. 928.

(b) The federal statutes construed by the court below are Section 107 and Section 110, Title 29, U. S. C. A.; 47 Stat. 71 and 47 Stat. 72, the pertinent provisions of which are as follows:

Section 107 of Title 29 U. S. C. A.:

> "No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.
>
> "The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, and said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from

electing to pursue his ordinary remedy by suit at law or in equity."

Section 110, Title 29, U. S. C. A.:

"Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

(c) The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on June 30, 1953. The Court's opinion is set forth at R. 71, and is not yet reported in the Federal (2d) Reporter. The petition for rehearing was denied August 1, 1953. The Court's opinion on rehearing is set forth at R. 84 and is not yet reported in the Federal (2d) Reporter.

Questions Presented

(a) Whether or not an appeal taken by virtue of Section 110, Title 29 U. S. C. A. from a temporary injunction against the picketing of a vessel is rendered moot by the departure of the vessel and the uncertainty of its return.

(b) Whether or not an appeal from a temporary injunction can become moot when there remains for determination a question of the right to damages for the wrongful procurement of the injunction.

(c) Whether or not in the absence of the undertaking provided for, Section 107, Title 29 U. S. C. A., there is a right of action for damages for the wrongful issuance of an injunction in a labor dispute case.

(d) Whether or not an appeal from a temporary injunction enjoining picketing can become moot when there remains for determination the right to damages on account of the picketing.

(e) Whether or not the Court of Appeals erred in its interpretation and construction of Sections 107 and 110, Title 29, U. S. C. A.

Reasons Relied upon for Allowance of Writ

The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been but should be settled by this Court in order that effect may be given to the provisions of the Norris-LaGuardia Act (Title 29, U. S. C. A. Sec. 110, *et seq.*) allowing a party against whom an injunction has been issued against picketing a speedy appeal and a right to damages for the wrongful issuance of the injunction. The Court of Appeals has dismissed petitioners' appeals and has deprived petitioners of the rights accorded them by federal statute for a speedy appeal from the issuance of the temporary injunctions and for damages for the wrongful issuance of the injunctions.

The Court's decision is in conflict with the decision of another Court of Appeals on the same matter. The United States Court of Appeals for the Ninth Circuit has held in this case that the mere temporary abeyance of the complained of practices rendered the question of the injunction against the conduct moot. This decision is in conflict with the decision of the United States Court of Appeals for the Third Circuit in *Shore* v. *Building & Construction Trades Council*, 173 Fed. (2d) 678 (1949).

The Court's decision is also in conflict with the decision of another Court of Appeals on another matter. The United States Court of Appeals for the Ninth Circuit has held in this case that a District Court can retain these cases

for the purpose of granting incidental relief by way of damages although its equity jurisdiction to support the injunctions does not exist. This decision is in conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Toucey* v. *New York Life Insurance Company*, 102 Fed. (2d) 16, 19 (1939).

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Norris-LaGuardia Act, and specifically to determine, whether or not, parties who have been restrained by injunctions in labor cases, can be deprived, by conduct of their adversary, of their right to speedy appeals and damages for the improper issuance of the injunctions.

Prayer

WHEREFORE, Your petitioners pray that a Writ of Certiorari be issued out and under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court the transcript of record in the cases entitled: William Benz, et al., Appellants, *vs.* Compania Naviera Hidalgo, S. A., a corporation, Appellee, No. 13,750; M. D. MacRae, et al., Appellants, *vs.* Compania Naviera Hidalgo, S. A., a corporation, Appellee, No. 13,751; and Jeff Morrison, et al., Appellants, *vs.* Compania Naviera Hidalgo, S. A., a corporation, Appellee, No. 13,752, including also the proceedings in said United States Court of Appeals to the end that said cause may be reviewed and determined by this Court, and the judgment of the United States Court of Appeals for the Ninth Circuit be reversed and the case remanded to said Court for true proceedings according to Law.

KNELAND C. TANNER,
RICHARD R. CARNEY,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 332

WILLIAM BENZ, M. D. MacRAE, JEFF MORRISON, ET AL.,

Petitioners,

vs.

COMPANIA NAVIERA HIDALGO, S. A., A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions of Court Below

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on June 30, 1953. The Court's opinion is set forth at R. 71, and is not yet reported in the Federal (2d) Reporter. The petition for rehearing was denied August 1, 1953. The Court's opinion on rehearing is set forth at R. 84, and is not yet reported in Federal (2d) Reporter.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on June 30, 1953. Petition for rehearing was denied on the 1st day of August, 1953. Petition for Writ of Ceritorari was filed on September 10th, 1953. The jurisdiction of the Supreme Court of the United States is invoked under Sec. 1254(1), Title 28 U. S. C. A.; 62 Stat. 928.

Statement of the Case

The S. S. Riviera is a vessel registered under the Liberian flag and owned and operated by the respondent, a Panamanian Corporation. The vessel arrived in Portland, Oregon in early September, 1952. The crew of the vessel were mostly German and British who joined the vessel at Bremen, Germany in March of 1952. Shortly after the vessel arrived in Portland, the crew members went on strike and left the vessel. The petitioners, beginning on October 14, 1952 picketed the vessel proclaiming that the respondent was unfair to American seamen. The respondent then brought three separate suits in the United States District Court of the District of Oregon asking temporary and permanent injunctions against the picketing, and for damages. Interlocutory injunctions, restraining the petitioners during the pendency of the suit from picketing the vessel, were issued on November 26, 1952, December 9, 1952 and December 12, 1952.

The petitioners then appealed to the United States Court of Appeals for the Ninth Circuit. The appeals were brought pursuant to Sec. 110, Title 29, U. S. C. A. for the purpose of dissolving said temporary injunctions on the ground that these were cases involving or growing out of a labor dispute, and that the District Court was without jurisdiction to issue the injunctions by reason of the Norris-La-

Guardia Act (Title 29 U. S. C. A., Secs. 111 to 114). While the cases were pending on appeal, the respondent filed its motion to dismiss the appeals on the ground that the interlocutory injunctions and appeals therefrom had become moot. Respondent showed by affidavit that the petitioners, in obedience to the District Court's injunctions, terminated the picketing of the vessel and thereafter the vessel had sailed from the Port of Portland, Oregon and was enroute from India to Europe. It was also shown that the vessel had no charter or commitments for return to any port of the United States, although the S. S. Riviera is a tramp steamer available for charter to carry cargoes to and from all the ports of the world.

The Court of Appeals granted the motion to dismiss the appeals as being moot. The Court was of the opinion that since the vessel had departed that there was no longer any dispute between the parties. The Court was also of the opinion that although the suit below was brought for an injunction and incidental relief by way of damages, that the power of the District Court to retain the case for the purpose of granting incidental relief by way of damages, was not dependent upon the ability of the complainant to make out a cause for equitable relief.

The Court of Appeals also decided that the appeals from the temporary injunctions were moot notwithstanding the petitioners' rights to damages in the event the injunctions were wrongfully procured. The Court of Appeals held that since no bond or undertaking was required or furnished, pursuant to Sec. 107, Title 29, U. S. C. A., or Rule 65 of the Rules of Civil Procedure, that there could be no recovery of damages by the petitioners for the wrongful issuance of the injunctions.

The decision of the Court of Appeals deprives petitioners of their determination of the validity of the temporary injunctions and deprives them of their right for damages,

costs and attorneys' fees provided for by Section 107, Title 29 U. S. C. A., should it be determined that the injunctions were wrongfully issued. These are valuable rights accorded to such litigants by the Norris-LaGuardia Act, but nullified by the decision of the Court of Appeals.

Specifications of Errors

1. The United States Court of Appeals for the Ninth Circuit erred in granting respondent's motion to dismiss petitioners' appeals.

2. The United States Court of Appeals for the Ninth Circuit erred in holding that the appeals taken by petitioners from the temporary injunctions against the picketing of the vessel were rendered moot by the departure of the vessel and the uncertainty of its return.

3. The United States Court of Appeals for the Ninth Circuit erred in holding that the appeals from the temporary injunctions enjoining picketing had become moot when there remained for determination the right to damages on account of the picketing.

4. The United States Court of Appeals for the Ninth Circuit erred in holding that the appeals from the temporary injunctions became moot when there remained for determination the question of the right to damages for the wrongful procurement of the injunctions.

ARGUMENT

Point I

The propriety of the issuance of temporary injunctions against picketing is not rendered moot by the temporary absence of a situs of the picketing.

The petitioners carried on their dispute with the respondent by picketing its vessel until they were enjoined by the District Court. The action of the petitioners thereafter

with respect to the picketing of the respondent's vessel was merely in obedience to the injunctions issued by the District Court. The dispute between the petitioners and the respondent has not been settled nor abandoned, but it is an admitted fact that petitioners intend to picket respondent and its vessels whenever possible. The United States Court of Appeals for the Ninth Circuit held that by the voluntary action of the respondent in removing its vessel from the port of Portland, Oregon, the labor dispute between the petitioners and respondent was thereby rendered moot. The temporary transfer of the situs of the labor dispute does not render the dispute moot. *Shore* v. *Building and Construction Trades Council,* 173 Fed. (2d) 678 (1949 C. A. 3). In the *Shore* case it was held that a labor dispute did not become moot because a particular construction job had been completed. There the court said:

> "The case is not moot. It is true that the construction of the theater has long since been completed. But there is reasonable ground for belief that there was an unfair labor practice. The defendants say that they are not legally liable for doing what they did and certainly indicate no lack of intention to do the same thing in the future. It is clear as a general proposition of equity that the granting of an injunction is not foreclosed because the act feared has already happened, if there is reasonable ground for believing that it will be done again. (Citing 28 Am. Jur., Injunctions, Secs. 6, 7 (1940); Restatement, Torts, Sec. 935, comment b (1939). And the defense that there is no longer need for an enforcement order because the complained of practices may, at least temporarily, ceased is one that has been threshed out many times in labor cases where it was the employer and not the union who made the point. (Citing National Labor Relations Board v. Pa. Greyhound Lines, 303 U. S. 261, 271 (1 Labor Cases 17,027) (1938); Note, 115 A. L. R. 307 (1938). See Independent Employees Assn. v. National Labor Rela-

tions Board, 158 F. 2d 448 (11 Labor Cases, 63,463) (CCA—2 1946); National Labor Relations Board v. Toledo Desk & Fixture Co., 148 F. 2d 426 (11 Labor Cases, 63,476) (CCA—6 1946). The current of authority is pretty uniform in rejecting this reason for refusing relief. Those decisions are in point here."

Also in *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U. S. 437, 438, 68 S. Ct. 630, 632, this Court said:

"A preliminary claim must be met, that the case has become moot. * * * The claim of mootness is also based on an affidavit stating that after dismissal of the appeal by the Court of Appeals, the union lifted its boycott. Since the record does not show that a stay of the injunction was granted pending action in this Court, we must assume that the union's action was merely obedience to the judgment now here for review."

And in *Thayer Co.* v. *Binnell*, 95 N. E. 2d 193, 197 (Mass. 1950) the court in holding that a preliminary injunction had not become moot while the case was on appeal, said:

"A strike like any other conflict comes to an end when the strikers had spent their strength and their subsequent efforts have no substantial effect upon the business of the employer so that there is no genuine hope of success. M. Steinert & Sons Co. v. Tagen, 207 Mass. 394, 397. Samuel Hertzig Corp. v. Gibbs, 295 Mass. 229, 231. Hubrite Informal Frocks, Inc. v. Kramer, 297 Mass. 530, 534-535. Here the strikes were being waged by the strikers in full force and vigor until all their activities were enjoined. These injunctions were obeyed and the plaintiffs thereafter operated their plants without any interference by the defendants. So far as appears the defendants have not written off these strikes as lost, or given up the struggle as a lost cause, but on the contrary are now pressing their appeals so that in the event of a favorable decision they may resume the strikes. In these circumstances, the

controversy still exists, awaiting the determination by this court of the rights of the parties. The controversy has not become moot. Bakery Sales Drivers Local Union No. 33 v. Wagshal, 333 U. S. 437, 443 (21 LRRM 2441). Hostilities have been suspended but not ended as will appear from what we have next to say."

The Court of Appeals in holding that the appeals in the case at bar had become moot relied upon *O'Brien* v. *Fackenthal,* 284 Fed. 850 (C. C. A.—6 1922). However, the *O'Brien* case merely stands for the rule that where the employees have settled their strike with their employer and have returned to work, the question of the propriety of the issuance of a temporary injunction against picketing has then become moot. We have no dispute with the rule followed in the *O'Brien* case, and a similar holding can be found in *Casey* v. *American Civil Liberties Union,* 100 Fed. (2d) 354 (C. C. A.—3 1938). But here there has been no settlement between the parties, and a dispute has not been abandoned, but merely the activities of the petitioners have been temporarily curtailed due to the injunctions of the District Court, and the action of the respondent in removing its vessel.

Point II

The propriety of temporary injunctions against picketing issued in the face of a challenge to the jurisdiction of the court, cannot become moot while the jurisdiction of the court is being invoked for the assessment of damages on account of the picketing.

The respondent commenced the cases involved in these appeals by filing suits in equity against petitioners asking injunctions against picketing and incidental relief by way of damages. Petitioners filed motions to dismiss on the ground that the court was without jurisdiction to issue the injunctions, because these were cases involving or growing

out of a labor dispute. Had the District Court decided that a labor dispute existed, petitioners' motions would have been granted and respondent's *entire* suit dismissed. *Matson Navigation Co.* v. *Seafarers Union* (D.C. Md. 1951) 100 Fed. Supp. 730, 29 L. R. R. M. 2364

A like decision by the Court of Appeals also would have resulted in the dismissal of the respondent's *entire* suit. *Fur Workers Union Local No. 72* v. *Fur Workers Union* (CA DC 1939), 105 Fed. (2d) 1.

It is fundamental law that where the matter relied upon to sustain equity jurisdiction fails of establishment, the court may not retain the case for the purpose of administering incidental relief. *19 Am. Jur. Equity,* Sec. 132, p. 132. *21 C. J. 142.*

It is because of this rule that where the jurisdiction of the court has been successfully challenged under the Norris-LaGuardia Act that the entire suit is dismissed.

However, in the cases at bar the Court of Appeals for the Ninth Circuit held, without citation of authority, that the District Court can retain these cases for the purpose of granting incidental relief by way of damages although its equity jurisdiction to support the injunctions does not exist (p. 4 of the Court of Appeals' opinion).

The Court's decision is in direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Toucey* v. *New York Life Ins. Co.,* 102 F. (2d) 16, 19 (1939) where the Eighth Circuit held as follows:

> "It is well settled that 'where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect, the court is without jurisdiction to proceed further and determine rights that are cognizable in a court of law.' 21 C. J. 142. It is also the rule 'that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought

by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. Russell v. Clark, 7 Cranch 69 (3 L. Ed. 271); Price's Patent Candle Co. v. Bauwen's Patent Candle Co., 4 Kay & J. 727; Baily v. Taylor, 1 Russ. & M. 73; French v. Howard, 3 Bibb (Ky.) 301; Robinson v. Gilbreth, 4 Bibb (Ky.) 183; Nourse v. Gregory, 3 Litt. (Ky.) 378.' Dowell v. Mitchell, 105 U. S. 430, loc. cit. 432, 26 L. Ed. 1142

See also, *19 Am. Jur. Equity,* Sec. 132, p. 132, where the rule is stated as follows:

> "The rule which permits the court of chancery to retain jurisdiction of litigation and finally dispose thereof is limited in its application to cases in which equitable relief has been administered pursuant to the prayer of the bill or in which the jurisdiction of the court has been rightfully invoked If the facts which are relied on to sustain equity jurisdiction fail of establishment, the court may not retain the case for the purpose of administering incidental relief. It is said that an equitable right must be both averred and proved as a prerequisite to the determination of adjudication of a purely legal right. The prevailing view is that where jurisdiction has not been established, the court may not award damages or enter any decree except for costs.
>
> If the rule otherwise, it has been argued, a litigant, by a pretended claim to equitable relief, might deprive his opponent of advantages incident to an action at law—for example the constitutional right of trial by jury."

Therefore, a decision by the Court of Appeals on the merits would not merely be the giving of an opinion on moot questions or abstract propositions, nor would it merely "declare for the government of future cases principles or rules of law," but on the contrary, such a decision would

determine the immediate rights of the parties concerning the dismissal or continuance of the respondent's claims for damages in these suits in the District Court.

III

The appeals from temporary injunctions restraining picketing cannot become moot when there remains for determination the question of damages for the wrongful procurement of the injunctions.

It is clear that the question of the propriety of the granting of an injunction is not rendered moot where there still remains the question of damages on account of the improper issuance of an injunction. The rule is stated as follows in *4 C. J. S. Appeal and Error*, Sec. 1354, p. 1952:

> "The propriety of the granting of a temporary injunction or restraining order becomes moot after the expiration of the time for the stay, unless there remains the issue of damages and costs, the injunction having been improvidently granted."

Indeed damages including losses, expenses, costs and attorneys' fees pursuant to Sec. 107, Title 29 U. S. C. A. have been allowed defendants in many cases after a decision that the temporary injunction was improperly issued in a case involving a labor dispute. *Donnelly Garment Co.* v. *International Ladies' Garment Workers Union* (D. C. Mo. 1942), 47 Fed. Supp. 67; *Cinderella Theatre Co. Inc.* v. *Sign Writers' Local Union*, 6 Fed. Supp. 830 (D. C. Mich. 1934); *Houston & No. Texas Motor Freight Lines* v. *Local No. 745* (D. C. Tex. 1939), 27 Fed. Supp. 262.

The Court of Appeals in its opinion on rehearing did not deny the validity of this proposition, but held that since no bond or understaking was furnished at the time of the granting of the temporary injunctions that there could be

no recovery of damages for the issuance of the temporary injunctions, had they been granted erroneously.

But the contrary was held in *Houston & N. T. Motor Freight Lines* v. *Local No. 734*, 27 Fed. Supp. 262 (D. C. Tex. 1939) where the court said:

> "The statute contains a provision in the latter part of the next to the last paragraph of section 107, title 29, U. S. C. A., to this effect:
>
> 'No temporary restraining order or temporary injunction, shall be issued, except on condition that complainant shall first file an undertaking with adequate security, in an amount to be fixed by the court sufficient to recompense those enjoined, for any loss, expense, or, damage, caused by the improvident, or, erroneous issuance of such order, or injunction, including all reasonable costs (together with reasonable attorney's fee), and expense of defense against the order, or, against the granting of any injunctive relief sought in the same proceeding, and, subsequently denied by the court.' * * *
>
> "While the statute provides for a bond, and, while it is manifestly true that the bond did not comply with the provisions of the statute, it might be that the labor unions, or, parties, would be entitled to their expenses, and attorney's fees, in accordance with this statute, even though no bond were given, but the statute does not so say. A liberal construction though, should be allowed to accomplish its purpose. *It could hardly mean that expenses were to be allowed, only, if the bond were given.*" (Emphasis ours.)

The right of action granted by Sec. 107 of Title 29, U. S. C. A. is greater than, and in addition to the usual right afforded a prevailing party for costs. *Cinderalla Theatre Co., Inc.* v. *Sign Writers' Local Union*, 6 Fed. Supp. 830 (D. C. Mich. 1934). Indeed without the statute there can be no recovery of damages for the erroneous issuance of an

injunction. *Tenth Ward Road Dist.* v. *Texas & P. Ry. Co.*, 5 Cir. 12 Fed. 245, 45 ALR 1513.

The Court of Appeals for the Ninth Circuit committed error holding that these appeals had become moot when there remained petitioners' claims for damages in the event that it should be held that the injunctions were erroneously issued. By its decision the Court of Appeals has effectively denied petitioners their right to damages, attorneys' fees and expenses allowed them under the statute in the event that these injunctions were improperly issued. Also because of the decision of the Court of Appeals, the petitioners cannot now in any proceeding secure a determination of the propriety of the issuance of the temporary injunctions, because this matter can only be determined in the injunction suit.

In *Janssen* v. *Shown*, 53 Fed. (2d) 608 (C. C. A. 9, 1931) the court stated the rule as follows:

> "*Ordinarily, the question of whether an injunction is wrongfully or improvidently sued out is and must be determined in the injunction suit*, and the judicial determination in this regard is the basis for the holding that the sureties on the bond are bound thereby and may not, in an action against them on the bond, relitigate the rightfulness or wrongfulness of the injunction. In Oelrichs v. Williams, 15 Wall. 211, 229, 21 L. Ed. 43, the Supreme Court of the United States lays down this rule: 'The appellants cannot go behind the decree in the case in which their bonds were given. The law and the facts of that case, as settled by the court, are conclusive of their rights in this proceeding. They cannot be permitted to raise any question as to either.'" (Emphasis ours.)

Furthermore, Congress intended that the matter of the propriety of the issuance of temporary injunctions should be decided promptly on an appeal such as these from the

issuance of temporary injunctions. Section 110, Title 29, U. S. C. A. provides as follows:

> "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

Conclusion

It is, therefore, respectfully submitted that the Court of Appeals has by its decision decided an important question of federal law arising out of the Norris-LaGuardia Act in a manner contrary to the express terms of the Act and the purposes for which it was enacted; that the decision has deprived the petitioners of the protection afforded them by said act against the erroneous issuance of temporary injunctions against picketing in cases involving labor disputes.

If the opinion of the Court of Appeals is allowed to stand, litigants against whom temporary injunctions are issued will be deprived of the rights afforded them by the Norris-LaGuardia Act for a speedy appeal for the determination of the validity of such temporary injunctions. The decision of the Court of Appeals is also in conflict with the decisions of other Courts of Appeals on important matters which should be settled by this Court.

We submit that the questions presented in this petition are of extreme importance, particularly in the application of the Norris-LaGuardia Act in cases involving the mari-

time industry and that a Writ of Certiorari should be granted by this Honorable Court to review the record and opinion of the United States Court of Appeals for the Ninth Circuit, and finally reverse the same and reinstate petitioners' appeals in that Court.

Respectfully submitted,

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